



Chambers of
GAIL ANDLER
JUDGE

COMPLEX CIVIL PANEL
ORANGE COUNTY SUPERIOR COURT

Superior Court of California County of Orange

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EARLY LEGAL ASSESSMENT (ELA) PILOT PROGRAM

As a compliment to the existing Orange County Superior Court (OCSC) ADR programs, a new pilot program has been developed to assist in the resolution of complex civil cases pending in CX 101. This program was developed with the view that any ADR program should be a multi-door program, and it is desirable to think about ways to expand access to dispute resolution since court funding has caused uncertainty about how future resources may be allocated.

The Pilot Program is referred to as ELA, or Early Legal Assessment, in order to avoid confusion with ENE, as there are some distinctions. The goals of the ELA project are to promote earlier settlement, to save the parties money, and to promote the efficient use of judicial resources. The program is ideal, for example, where a MSJ/MSA and/or expensive discovery is contemplated, but it is too early in the process for the parties to prepare and file such motions. Often, parties are unable or unwilling to enter into settlement discussions because they believe success in a case will depend on the outcome of a particular legal issue. The traditional litigation model is often one of extensive discovery, followed by law and motion hearings, leading up to the preparation, filing and hearing of what the parties thought would be a dispositive motion. ELA is designed to meet the needs of the parties in a less expensive and more expeditious manner.

In the Pilot Program, counsel will be referred to experienced and scholarly retired state and federal judges and justices who are willing to work with the following framework. The attorneys are expected to meet and confer to identify a pivotal legal issue. Counsel will then choose the neutral based on the confidence that the neutral would have the necessary expertise to analyze the legal issue. Counsel are expected to agree to submit a letter brief of limited length with citations to the relevant authority. The Pilot Program contemplates that counsel will keep the briefs confidential from one another. This would allow the neutral to be prepared to hear their oral argument. The Pilot Program contemplates that counsel appear separately to offer their oral argument as to how the issue should be analyzed. The neutral would hear the arguments from both sides, and then, **meeting separately with them, give a confidential analysis of the likelihood that the party would prevail on that argument.** As agreed upon by counsel and the neutral, the parties will be present to hear the assessment by the neutral. It is contemplated that the neutral will suggest to all parties participating that they schedule mediation following the ELA process. The reason for this aspect of the program is to preclude one party from assuming that the party suggesting mediation received an unfavorable assessment of their legal issue.

Neither side would be told by the neutral the arguments advanced or the authorities relied upon by the other side, nor would they be told what the neutral communicated to the other side. The parties would then be armed with a confidential advisory ruling which could help inform an early resolution. The trial judge would not learn of the confidential advisory ruling.

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If the parties choose to do so, they may stipulate to exchange letter briefs and present their arguments in a joint setting. The reason for the presumption of confidentiality would be to assuage the fears of the attorneys that they were revealing "too much too soon" to the opposing side. Examples of issues appropriate for ELA include, but are not limited to, choice of law, statute of limitations, contract interpretation, or measure of damages. With a three page letter brief and one hour to present argument, for example, it would be far more cost-effective for the client than the average mediation session.

This is designed to serve as a candid and confidential assessment early in the litigation where the parties differ substantially on legal issues and can be useful in educating clients and carriers as to the realities of the litigation and in so doing remove barriers to discussions about the monetary value of the case. Even when the process does not result in prompt resolution, it may prove helpful in narrowing or simplifying issues for trial.

ELA is ideally suited to cases where the parties believe the outcome may depend on the determination of a key legal, as opposed to factual, issue. Early in the pretrial period, this ADR process is designed to bring together all parties and counsel to present a summary of the legal arguments on a discrete and pivotal issue of law and receive a non-binding neutral assessment by an experienced neutral attorney or retired judge with subject matter expertise.

Early Legal Assessment could be used for a wide array of civil disputes including product liability, personal injury, labor and employment and contract cases. It is also useful in cases involving high levels of animosity among parties, complex legal disputes involving multiple issues or cases possessing certain characteristics such as multiple parties, numerous claims for relief, complex legal issues, long trials and continuing discovery disputes. In appropriate cases, the parties may agree to stay discovery or defer filing motions for summary judgment while engaging in the ELA process, thus saving thousands of dollars. Participation in this ELA Pilot Program, however, does not preclude the parties from preparing and filing motions where no stay has been imposed by the Court.

Typical Framework (can be varied by agreement):

1. Counsel meet and confer to identify pivotal legal issue;
2. Counsel meet and confer to select ELA neutral;
3. Counsel confirm with neutral the date for a separate oral argument for each side;
4. Counsel prepare and submit to the neutral a letter brief (suggested 3-5 pages) in the form of an executive summary, with bullet points of main contentions and citations to the key cases/statutes supporting the positions advanced. Briefs are not exchanged;
5. Counsel (and parties) appear for oral argument (suggested 1 hour or more as agreed upon between counsel and neutral);
6. Neutral provides ELA "ruling" orally to counsel and parties, confidentially and separately to each side;
7. Neutral suggests to both sides that they proceed to mediation.